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AT SEATTLE
 CLERK U.S. DISTRICT COURT
 WESTERN DISTRICT OF WASHINGTON
 BY _____ DEPUTY

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CV 01-01915 #00000032

**UNITED STATES DISTRICT COURT
 FOR THE WESTERN DISTRICT OF WASHINGTON**

BIANCA FAUST, individually and
 as guardian of GARY C. FAUST, a minor,
 and BIANCA CELESTINE MELE,

Plaintiffs,

vs.

BELLINGHAM, WASHINGTON LODGE #493
 LOYAL ORDER OF MOOSE, INC.,
 JOHN DOES (1-10) (fictitious names of unknown
 Individuals and/or entities) and ABC
 CORPORATION (1-10) (fictitious names of
 unknown individuals and/or entities),

Defendants.

Civil Action No. C01-1915R

DECLARATION OF EXPERT FRED
 DEL MARVA

FREISE & WELCHMAN
 ATTORNEYS AT LAW
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 SEATTLE WASHINGTON 98104 #206 587 6570
 MICHAELH@FREISE WELCHMAN.COM

DECLARATION OF EXPERT FRED DEL MARVA 1

ORIGINAL

1 Fred Del Marva, PI, PPO declares and states

2 1. I am over the age of eighteen years. I am a Federal and State court qualified
3 expert in the hospitality industry (bars, restaurants, hotels, casinos, etc), specializing in premises
4 liability, premises security, and liquor liability (Dram Shop) litigation

5 2. Since 1986 I have been retained in over 400 cases (both on the plaintiff and
6 defense sides) in forty-eight (48) of the contiguous states, as well as Hawaii, Jamaica, the
Dominican Republic, Puerto Rico, and Grand Cayman.

7 4. I have been retained in approximately one hundred (100) dram shop or liquor
8 related incidents to consult, investigate, perform analyses, and testify as an expert

9 5. I have worked with toxicologists across the country and have studied responsible
10 service of alcohol programs such as training programs in the states of Washington, Nevada,
11 Missouri, Mississippi, New Jersey, Washington, Kansas, Illinois, Tennessee, New Mexico,
12 Louisiana, Connecticut, Hawaii, Arizona, and industry approved training programs such as
13 National Alcoholic Beverage Control Association Alcohol Server Liability; Michigan Licensed
14 Beverage Association "Techniques of Alcohol Management" (TAM), National Restaurant
15 Association "Alcohol Awareness Program", California Alcohol Beverage Control Board
16 "Licensee Education on Alcohol and Drugs" (LEADS); American Hotel and Lodging
17 Association "Serving With Care" and have been previously certified as a trainer in Anheuser
Bush "Training for Intervention Procedures by Servers of Alcohol (TIPS).

18 6. I have been involved in the hospitality industry for over forty-five (45) years,
19 twenty (20) of which have been as a restaurant, bar and hotel consultant. For the past sixteen
20 (16) years, I have worked as a forensic investigator, liability consultant, security expert, and
21 legal consultant. Attached hereto as Exhibit A is a copy of my current Curriculum Vitae.

22 7. This affidavit is in no way intended to be exhaustive. As additional information
23 is made available to me, my opinions may be supplemented to reflect relevant new information.

24 8. In formulating the opinions contained herein, I have reviewed pleadings,
25 Washington State Patrol's Report of Investigation, Defendant's Motion for Summary Judgment,
26 Whatcom County Medical Examiner's Autopsy Report and Hawkeye Kinkaid's toxicology
report.

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1 9. It is my understanding that Mr. Kinkaid entered the defendant's premise with his
2 girlfriend Alexis Chapman at approximately 4:30 p.m. Ms Chapman was the bartender that
3 evening and said that she served Mr Kinkaid only two beers, which is questionable because it is
4 not his beverage of choice.

5 10. Ms. Chapman has changed her story three times regarding the times Mr. Kinkaid
6 left the premises. The times range from 6:00 p.m. to between 6:00 p.m. and 6:30 p.m. and
7 between 7:00 p.m. and 7:30 p.m. The accident was reported to the police at 7:49 p.m. And, in
8 the motion for summary judgment, opposing council has estimated that the time Mr. Kinkaid
9 left the premises was even earlier, between 5:45 p.m. and 6:00 p.m.

10 11. Ms. Chapman said that Mr. Kinkaid left the Moose lodge to buy some cooked
11 chicken in a grocery store. The grocery store is approximately a fourteen (14) minute drive from
12 the Moose lodge. The deli section starts to break down between the hours of 7:00 p.m. and 7:30
13 p.m. The scene of the accident is approximately a one (1) minute drive from the grocery store

14 12. Therefore, if Mr. Kinkaid left the Moose lodge at approximately 7:30 p.m. he
15 would have arrived at the grocery store at approximately 7:44 p.m. to find the deli would have
16 already been broken down. After spending a couple of minutes at the grocery store, he would
17 have left the grocery store and would have driven for one (1) minute before being involved in
18 the accident. That would bring the time line to 7:47 p.m., about the time of the reported
19 accident

20 13. Mr. Rayburn (a patron at the bar at the time Mr. Kinkaid was there) stated in his
21 declaration that Mr. Kinkaid did not consume any alcohol, only two beers. Based on my
22 training in the programs noted in paragraph number 5, a twelve ounce bottle or can of beer has
23 the same amount of alcohol as a one ounce shot of 100 proof liquor or a 1 1/4 ounce shot of 80
24 proof liquor. Therefore I question the accuracy of Mr. Rayburn's observations at the
25 defendant's premise.

26 14. I have read the declarations of both Mr. Rayburn and Mr. Anderson and it is my
opinion that both gentleman are not qualified to render an opinion on whether Mr. Kinkaid was
obviously intoxicated, was or was not physically impaired, mentally impaired, unable to think
rationally, and a danger to himself and others

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1
2 15. Based on the documents that I have reviewed, I am aware that Mr. Kinkaid's
3 blood was drawn at approximately 8:49 p.m. and resulted in a BAC of .162. Based on my
4 background, work with toxicologists, experience and training, it is my opinion that Mr.
5 Kinkaid's BAC was approximately .177 at 7:30 p.m. and approximately .192 at 6:30 p.m. The
6 increase in BAC is calculated by adding the absorption of one drink (.015 BAC) per hour

7 16. Based on Mr. Kinkaid's BAC of .162 at 8:49 p.m., which would have been the
8 same at the time of the accident and his demise, it is my opinion that he was obviously
9 intoxicated when his girlfriend (Ms. Chapman) served him his last beverage and was obviously
10 intoxicated prior to leaving the premises.

11 17. Based on the information contained in paragraph number 10, Mr. Kinkaid would
12 have displayed signs of intoxication during the time he consumed alcohol at the defendant's
13 premises such as loss of inhibitions, impairment of judgment, impairment of reactions, and
14 impairment of coordination

15 18. Ms. Chapman had been trained in the state mandated responsible service of
16 alcohol program and in my opinion, because Mr. Kinkaid was her boyfriend, consciously and
17 intentionally deviated from that training which is a conscious disregard for the safety of patrons
18 and others they may encounter. And, in my opinion this conduct constitutes gross negligence.

19 19. Based on my review and analyses of the circumstances and facts relevant to the
20 injury sustained by the plaintiffs, it is my opinion that the defendant, its servants, agents,
21 representatives and employees, violated RCW 66.44.200 and WAC 314-16-150, breached
22 industry standards, violated the instructions and procedures addressed in the Washington State
23 Liquor Control Board's "Handbook for Liquor Licenses and Employee's" and were both directly
24 and indirectly responsible for the injuries to the plaintiffs.

25 20. It is my opinion, and one to which I will testify at trial if called upon, that on the
26 night of the incident at the defendant's premises indisputable circumstances existed which
created a reasonably foreseeable risk to one's safety, and that such safety risk, would have been
reasonably anticipated by a responsible, prudent, and professional operator of a bar and their
staff

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21 Based on the totality of the circumstances, I further opine that the methodology
and principles employed by the defendant with regard to the responsible service of alcohol
breached industry standards and were not consistent with those that would have been employed
by a reasonable operator given the same circumstance.

22. The state of Washington issues liquor licenses to businesses who want to serve
alcohol. The Moose Lodge, although a fraternal order, bears the same duties and responsibilities
as a saloon operating in the same state. Those duties are to insure that the providers of alcohol
do not serve patrons who are obviously intoxicated. It is obvious to me, and my opinion, that
this defendant deviated from and breached that duty.

23. Lastly, it is my opinion that the conduct of the defendant and their employees, by
irresponsibly serving Mr. Kinkaid alcohol and allowing him to leave the premise, enter his
vehicle and drive away while obviously intoxicated, was the proximate cause of the injuries
sustained by the plaintiffs.

I declare under penalty of perjury of the laws of the State of Washington that the
foregoing is true and correct.

EXECUTED at Novato, California, this 26 day of September, 2002

Fred Del Marva

Fred Del Marva, PI, PPI

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